No. 85-2102 (5)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, *et al.*,

Respondents.

BRIEF FOR THE RESPONDENTS IN RESPONSE TO MOTION OF THE REGIONAL AIRLINE ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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MONTAUK-CARIBBEAN AIRWAYS, INC., d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as The Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,

Respondents.

BRIEF FOR THE RESPONDENTS IN RESPONSE TO MOTION OF THE REGIONAL AIRLINE ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Respondents respectfully submit this brief in response to the motion of the Regional Airline Association ("RAA") for leave to file a brief amicus curiae in support of the petition for a writ of certiorari filed by Montauk-Caribbean Airways, Inc. ("MCA").

REASONS FOR DENYING THE MOTION

The Rules of this Court are clear: Where consent of the parties has been refused, a motion for leave to file a brief of an amicus curiae in support of a petition for a writ of certiorari is "not favored." See Rule 36.1 of the Rules of the Supreme Court of the United States. Here, consent has not been obtained, and the motion and brief filed by RAA are a perfect illustration of why that rule pertains.

Wholly foreign to, and ignorant of, the contractual dispute at issue in this case, RAA served its brief at a time which prevented respondents from addressing it in connection with their opposition to the petition. Further, in its brief, RAA urges this Court to grant a writ of certiorari for a whole host of reasons which were not raised by the petitioner and, more importantly, which

have nothing to do with the case actually before the Court. More specifically, by misstating the holding of the Second Circuit, RAA attempts to transform the instant contract dispute into an issue of national import. Because the Second Circuit's decision simply did not have the reach or effect ascribed to it by RAA, its motion for leave to file a brief amicus curiae should be denied.

I. RAA'S EXPRESSED CONCERNS ARE NOT PRESENT IN THIS CASE

According to RAA, this case merits review by the highest Court of the land because the effect of the Second Circuit's decision is to permit a municipality to exercise proprietary powers or rights "for the purposes of directly and materially affecting an air carrier's

rates, routes or services."* However, the Second Circuit did no such thing.

In fact, the Second Circuit's holding was narrowly tailored to meet only the issue actually raised before it -- "whether the Town of East Hampton was exercising its proprietary rights as owner of the Airport when it refused to modify the ten-year lease to which the parties agreed in 1979."** Insofar as the issue of federal preemption was concerned, the court held that, in light of the existing lease (to which MCA had voluntarily agreed), there was no

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* Regional Airline Association's Brief Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, dated August 8, 1986 ("RAA Brief", p. 11).

** Petition of Montauk-Caribbean Airways, Inc. for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, dated June 25, 1986 ("MCA Pet."), p. 41a.

authority for the proposition that the Town of East Hampton was required to modify that lease so as to permit MCA to operate as an FBO year-round, or to rent MCA equipment and services to conduct year-round air service.

It is clear, we submit, that the scope and effect of that holding is a far cry from what RAA has imagined it to have been -- a "radical expansion of [a municipality's] proprietary powers and rights, crippling the free market basis of airline deregulation. . ." (RAA Brief, p. 2). Hence, review by writ of certiorari is unwarranted.*

In sum, although RAA would have this Court believe that the decision

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* The exceedingly narrow scope of the issues decided below constituted the reason why respondents declined to give RAA their consent to file its brief.

below will have deleterious effects of a national magnitude, in fact the holding, which is based upon a specific lease agreement between the Town and MCA, does not and could not allow the possibility of the kind of municipal overreaching feared by RAA.* Further, RAA's specific concern that the decision will, among other things, "conflict with the ability of the [Federal Aviation Administration] to administer the Federal aviation laws and detract from its ability to fulfill its role in air safety" is remarkable (RAA Brief, p. 7). To the contrary, the decision below, by denying a private right of action under the Federal Aviation Act, leaves the Federal Aviation

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* Indeed, as petitioner and RAA are forced to concede, MCA is currently operating air carrier service in and out of the East Hampton Airport (MCA Pet., p. 4; RAA Brief, p. 5).

Administration, the agency entrusted by Congress with the responsibility for enforcing those laws, free to exercise its statutory mandate without conflicting decisions arising out of disputes between parties unconcerned with the national welfare.*

II. RAA HAS RAISED NO ISSUE WORTHY OF REVIEW

In support of its contention that this case is worthy of review, RAA repeats several reasons advanced by MCA, adds several new ones which MCA never raised, and conjures up a conflict "in principle" in the Circuits. None of

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* In fact, the Federal Aviation Administration is currently taking an active role in investigating the very dispute at issue herein. Thus, just as the federal aviation laws contemplate, the Federal Aviation Administration is, and should be, the proper forum for MCA's complaint.

these reasons is sufficient to warrant review.

Insofar as RAA merely repeats arguments advanced by MCA, they should be rejected for reasons set forth in the Respondents' Brief in Opposition to MCA's Petition. To the extent RAA has purported to assert several new reasons for review, each one was expressly disclaimed or disavowed by the petitioner, MCA, in either the lower courts or in this Court.*

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* Thus, for example, although RAA urges review of whether the Town violated the Federal Aviation Act, 49 U.S.C. § 1349(a) (RAA Brief, pp. 13-17), MCA has conceded to this Court that there is no private right of action under that provision (MCA Pet., p. 14). Similarly (as set forth more fully in the Respondents' Brief in Opposition), while MCA disclaimed below any reliance upon the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2210, RAA seeks review of that issue (RAA Brief, pp. 13-15).

Review of any such issue is unwarranted and inappropriate.

Finally, RAA has created out of whole cloth a "conflict in principle" in the Circuits which, we submit, is a euphemism for no conflict at all.* In fact, the Second Circuit's decision was limited exclusively to the unavailability of a private right of action under 49 U.S.C. § 1349(a). Not one case cited by RAA holds, under the controlling legal principles, that there is a private

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* RAA is not helped by its disingenuous restatement of the Second Circuit's holding. Although the Second Circuit held, simply, that there is no private right of action under Section 1349(a) (MCA Pet., pp. 41a-43a), RAA seeks to create the impression that, instead, the court reached the merits of MCA's claim and held that there was no discrimination at the Airport (RAA Brief, p. 15). This sleight of hand does not change the fact that none of the cases cited by RAA are in conflict with the Second Circuit's decision.

right of action under that provision.* Hence, there is not, and cannot be, a "conflict" of the kind postulated by RAA.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that

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* At issue in City of Pompano Beach v. F.A.A., 774 F.2d 1529 (11th Cir. 1985), was judicial review of a determination made by the Federal Aviation Administration, not a private right of action brought ab initio in federal court. The case of Niswonger v. American Aviation, Inc., 411 F. Supp. 769 (E.D. Tenn), aff'd without op., 529 F.2d 526 (6th Cir. 1975), is unpersuasive since it was decided before Cort v. Ash, 422 U.S. 66 (1975), although affirmed without opinion thereafter. Since Cort established the controlling principles for implying private rights of action, Niswonger is no longer good law, as at least two courts have squarely held. See Hill Aircraft & Leasing Corp. v. Fulton County, Ga., 561 F.Supp. 667, 673-74 (N.D. Ga. 1982), aff'd without op., 729 F.2d 1467 (11th Cir. 1984); Guthrie v. Genesee County, 494 F.Supp. 950, 960 (W.D.N.Y. 1980). Since the Second Circuit did not purport to address any provision other than 49 U.S.C. §1349(a) (because none had been raised by MCA), the remaining cases cited by RAA are wholly inapposite.

RAA's motion should be denied. Neither review by writ of certiorari nor remand is warranted or appropriate.

Respectfully submitted,

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